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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEREMY CHRISTOPHER-EDWARD CASWELL, Defendant and Appellant.	F075710 (Super. Ct. No. CRF46790) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Meehan, J. and DeSantos, J.

Appellant Jeremy Christopher-Edward Caswell challenges the language in a condition of his probation which required him to "[c]ooperate with the Probation Officer in a plan for psychological or psychiatric/alcohol and/or drug treatment."

STATEMENT OF CASE

On April 4, 2016, a first amended information was filed charging appellant with assault by means of force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(1); count 1), making criminal threats (§ 422; count 2), and the discharge of a firearm with gross negligence (§ 246.3, subd. (a); count 3). It was further alleged in counts 1 and 2 that appellant used a firearm within the meaning of section 12022.5, subdivision (a).

Appellant's jury trial commenced on March 1, 2017. The jury returned its verdicts on March 3, 2017, finding appellant guilty on count 3 and not guilty on counts 1 and 2.

The probation officer's report stated that appellant had been convicted in 2004 of a violation of Vehicle Code section 23103, subdivision (a) (reckless driving) and in 2006 of a violation of Vehicle Code section 23152, subdivision (b) (driving under the influence). The report also stated that appellant had provided information that he occasionally drank alcohol and used "Marijuana/Hashish" on a "Frequent/Daily" basis. Appellant admitted that "he smokes approximately 'a joint a day' for back pain and to help him sleep." Appellant told the probation officer that "he previously participated in the Wet and Reckless Program along with the DUI First Offender Program." He previously had attended Alcoholics Anonymous but did "not believe counseling is necessary. However, [appellant] indicated he will participate in counseling as a condition of probation." The probation officer believed that appellant was "in the 'Moderate' risk category for re-offending."

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1 All statutory references are to the Penal Code unless otherwise noted.

The probation officer's report recommended that the imposition of sentence be suspended for a period of five years and that appellant be admitted to probation under terms and conditions, one of which was:

> "16. Cooperate with the Probation Officer in a plan for psychological or psychiatric/alcohol and/or drug treatment."

On May 15, 2017, at the sentencing hearing, the court stated that the offenses were committed by appellant in a "drunken state," "in an unbelievably reckless manner." The court agreed with the probation officer that the incident "was fueled, to a large extent, by alcohol and the fact that [appellant] was drunk when he went down there." The court ordered that the imposition of sentence would be suspended for a period of five years and admitted appellant to probation under the terms and conditions set forth in the order granting probation. Appellant acknowledged that he had read those terms and that he agreed to probation on those terms.

> "[THE COURT]: I am not quite so convinced that he doesn't pose a risk to the safety of the community or any other person, and that is the reason why I imposed a condition that he not consume any alcohol, so he's got to totally abstain from alcohol. I think if he'd not been drinking, I'm not sure this would have happened."

Appellant filed a timely notice of appeal on May 24, 2017.

STATEMENT OF FACTS

Prosecution's Evidence

In 2015, appellant resided on 25 acres outside of Jackson. Homeless people lived on the partially undeveloped land as well. The victim, Leland D., had lived on the property for six to nine months.

On March 3, 2015, Leland picked up his paycheck from his work and returned to his tent. He fell asleep with candles burning in his tent. One of the candles set the tent on fire. Leland was awakened by the flames and narrowly escaped without injury. He watched the fire destroy his belongings and burn itself out.

Bare from the waist down, Leland climbed into a sleeping bag untouched by the fire and fell asleep. He was awakened later that night by yelling and at least five gunshots. Two men approached him. One of them put a pistol to Leland's head while the other stood by holding a shotgun. The man with the pistol drew his face close to Leland's and identified himself as appellant. He threatened to kill Leland if he did not leave. He then pointed the gun away from Leland's head and fired it at least three times. The other man fired his shotgun twice. Leland told the men he could not leave because he was too intoxicated and had no clothes on from the waist down. The man again threatened to kill Leland if he did not leave and then left with his companion. Leland fell back asleep shortly thereafter.

At about 11:00 p.m. that same evening, sheriff's deputies were dispatched to the area in response to a report of a fire and gunshots. They were met by appellant. After checking the area, the officers found no evidence of a fire and returned to talk to appellant. Appellant told them that he had not observed anything suspicious or heard gunfire that evening. One of the officers testified that appellant appeared intoxicated when they spoke to him.

The following morning, Leland found a pair of pants, left the area, and reported the incident to the Tuolumne County Sheriff's Department. A deputy searched Leland's campsite and found a single expended shell casing.

Several days later, Leland was shown a photo lineup and identified the photo of appellant as the man who threatened him and shot near his head.

Officers executed a search warrant at appellant's home on March 25, 2015, and seized a .40-caliber Glock handgun. At that time, appellant admitted putting out the fire but denied seeing Leland or firing a gun.

It was later stipulated by the parties that the expended shell casing found at Leland's campsite had been ejected from the .40-caliber Glock handgun found at appellant's residence.

Defense

Appellant's version of the events on the night in question was that he and his brother spotted the fire and tried to put it out. Appellant spoke to Leland and offered to pay him $100 if he cleaned up the garbage in the area and left within five days. Leland declined the offer but said he would leave. Appellant and his brother returned to his residence. Along the way appellant tripped, causing his gun to accidentally discharge.

Appellant admitted lying to the officers who came to investigate the fire. He testified he was scared at that time and did not know what to say.

DISCUSSION

Appellant's arguments are based upon his interpretation of the language in a condition of his probation that required him to "[c]ooperate with the Probation Officer in a plan for psychological or psychiatric/alcohol and/or drug treatment" (probation condition).

Appellant argues that the words "psychological or psychiatric" and "treatment" in the probation condition "subject[] him to the possibility of psychological/psychiatric treatment beyond that necessary to drug and/or alcohol rehabilitation. This condition was necessarily overbroad because mental illness played no role in the case." Appellant argues:

> "As explained in appellant's opening brief, this [probation] condition is improper to the extent that it requires [ ] appellant to cooperate in a plan for psychological and psychiatric treatment. It is not reasonably related to appellant's crimes or possible future criminality. Moreover, it is unconstitutionally overbroad in that it infringes on appellant's right to privacy. Accordingly, it must be modified to only require appellant to cooperate in [a] plan for psychological or psychiatric treatment solely related to alcohol and/or drug rehabilitation." (Emphasis added.)

Appellant argues in essence that without such limiting language which is underlined in the above quotation, the words "psychological or psychiatric" and "treatment" could authorize the probation officer to impose upon appellant a form of treatment for a mental problem that was unrelated to alcohol or drug rehabilitation.

Appellant's interpretation of the probation condition is incorrect. Appellant ignores that the words "psychological or psychiatric" and "treatment" do not stand alone. The word "psychiatric" is part of the phrase "psychiatric/alcohol" and thus is linked to "alcohol" and is not open ended to allow for psychiatric treatments other than for alcohol. Moreover, the phrase "psychological or psychiatric/alcohol" also does not stand alone because they describe and limit the word "treatment." Thus, the "treatment" may be either "psychological or psychiatric/alcohol." The word "treatment" is in turn further limited and qualified by the phrase "alcohol and/or drug." Thus, properly construed the probation condition appellant challenges merely requires him to cooperate with a "plan" and "treatment" that is directed at appellant's "alcohol and/or drug" problems and should be either "psychological or psychiatric/alcohol."

We conclude that the limiting language appellant argues should have been included in the probation condition---"to only require appellant to cooperate in [a] plan for psychological or psychiatric treatment solely related to alcohol and/or drug rehabilitation"—would have been redundant.

Appellant correctly does not argue that it is impermissible to require him to participate in an "alcohol and/or drug" "plan" and "treatment" or that such a "plan" and "treatment" are unrelated to his offense because of the circumstances surrounding the offense, the contents of the probation officer's report and the trial court's findings at sentencing, which are set forth above. Thus, a "psychological or psychiatric" "plan" and "treatment" directed at appellant's problems with "alcohol and/or drug[s]" is sufficiently related to appellant's offense because the offense was the product of alcohol and perhaps

marijuana intoxication and, further, does not infringe upon appellant's constitutional right of privacy. Finally, this court's interpretation of the probation condition establishes that trial counsel was not ineffective for failing to object below because such an objection would have been meritless.

Moreover, even assuming that appellant's challenges to the probation condition have some merit, appellant admits that he did not object to or otherwise challenge the probation condition in the superior court. Appellant also does not contest that such failures can constitute waivers by forfeiture. (*In re Sheena K.* (2007) 40 Cal.4th 875.) In *People v. Kendrick* (2014) 226 Cal.App.4th 769 (*Kendrick*), the court quoted the defendant's argument and concluded:

> " 'The trial court failed to engage in the necessary case-specific exercise of its discretion when it imposed the probation condition prohibiting [him] from accessing the Internet without his probation officer's approval.' But the reason the trial court failed to exercise that discretion is because defendant failed to raise these arguments below. If they had been raised, both the prosecutor and the probation department would have had the opportunity to respond. In turn, the trial court, taking all of these circumstances into consideration, could have exercised its discretion to decide whether to impose the probation condition and, if so, on what specific terms. We therefore conclude that defendant's failure to raise the constitutional claim in the trial court constitutes a forfeiture of his right to raise it on appeal. Furthermore, we decline defendant's request that we exercise our discretion to consider the forfeited contention." (*Kendrick, supra,* 226 Cal.App.4th at p. 778.)

This forfeiture rule applies even to a constitutional challenge to a probation condition unless the condition is so "facially vague and overbroad" that the challenge presents "a pure question of law, easily remediable on appeal by modification of the condition." (*In re Sheena K., supra,* 40 Cal.4th at p. 888.) This test has been construed to mean that the doctrine of forfeiture will be applied to constitutional challenges "that cannot be resolved 'without reference to the particular sentencing record developed in the trial court [and thus does not] present a pure question of law." (*Kendrick, supra,* 226

Cal.App.4th at p. 777.) *Kendrick* held that constitutional challenges such as appellant's that a "probation condition was not related to [his] conviction and was not reasonably necessary for his rehabilitation or protection of the public" were subject to the forfeiture rule. (*Kendrick*, at p. 777.)

We conclude that even if appellant's interpretation of the probation condition had merit, appellant's failure to object to the probation condition would forfeit the issue in this appeal. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 ["The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement."].)

Appellant argues that the failure to object to the probation condition constituted ineffective assistance of counsel. Even assuming that a meritorious objection could have been made to the probation condition, appellant is required to show that counsel did not have a sufficient tactical reason for not making an objection.

> "Our past decisions establish, with regard to ineffective- assistance-of-counsel claims, that '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] … unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

It is appellant's burden to show what portion of the record in this case establishes that " ' "counsel was asked for an explanation and failed to provide one" ' " or that " ' "there simply could be no satisfactory explanation" ' " for counsel's failure to object. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; cf. *People v. Dougherty* (1982) 138 Cal.App.3d 278.) Appellant has failed to meet that burden.

Moreover, counsel may have chosen not to make an objection to the probation condition because appellant told him that he wanted whatever "psychological or psychiatric" treatments that might be offered to him by the probation department.

We conclude that even if trial counsel should have objected to the probation condition, appellant has failed to show that the record establishes that trial counsel did not have a satisfactory tactical reason for not making an objection.

DISPOSITION

The judgment is affirmed.